MICHAEL RODAK, JR., C

In The

Supreme Court of the United States

October Term, 1973

No. 73-1420

ANIELLO DELLACROCE,

Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Herald Price Fahringer, Esq.
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

Joseph Pannar, Esq.
305 Broadway
New York, New York 10007
(212) 962-2243

Counsel for Petitioner

Lipsitz, Green, Fahringer,
Roll, Schuller & James
Of Counsel.

Daily Record Corporation
Rochester, New York

TABLE OF CONTENTS

	Page
Table of Cases	ii
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statutes Involved	3
Statement of Facts	4
The Tax Case	4
Reasons For Granting The Writ	
Point I — The government failed to affirmatively establish an independent source of evidence for petitioner's federal indictment after he had been granted transactional immunity and testified fully before a state grand jury.	6
Same Prosecutor in Both Cases	7
The *Kastigar* Rule	9
The Second Circuit's Misconstruction of the *Kastigar* Rule	11
Conflict in Circuits	12
Point II — The petitioner was unconstitutionally convicted of tax evasion for failure to report the alleged receipt of stock never registered in his name, never possessed by him, and which was being held in escrow subject to adverse claims.	14
Point III — The government's refusal to allow full disclosure of facts needed to impeach the prosecution's chief witness denied petitioner due process of law.	17
Conclusion	20
Appendix A — Court of Appeals Opinion	A-1
Appendix B — Statutes Involved	B-1

Table of Cases

Big Lake Oil Company v. *Commissioner*, 95 F.2d 573 (3d Cir. 1938) 15

Brady v. *Maryland*, 378 U.S. 83 (1963) 18

Commissioner v. *Edwards Drilling Co.*, 95 F.2d 719 (5th Cir. 1938) 16

Daniel H. Deutsch, 26 T.C.M. 649 (1967) 15

Estate of Jacob M. Eisenberg, 6 T.C.M. 771 (1967) 15

Estate of Margaret Allen Fairbanks, 3 T.C. 260 (1944) . 15

Ingram v. *United States*, 360 U.S. 672 (1959) 16

In re Cardassi, 351 F. Supp. 1080 (D. Conn. 1972) 12

In re Minkoff, 349 F. Supp. 154 (D.R.Is. 1972) 12

Kastigar v. *United States*, 406 U.S. 441 (1972) 6, 9

Lubin v. *United States*, 313 F.2d 419 (9th Cir. 1963) ... 16

O'Kelley v. *United States*, 116 F.2d 966 (8th Cir. 1941) . 16

United States v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) ... 12

United States v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973) 12

United States v. *Seiffert*, 463 F.2d 1089 (5th Cir. 1972) . 12

United States v. *Terranova*, S.D.N.Y., 71 Crim. 332 18

Ventimiglia v. *United States*, 242 F.2d 620 (4th Cir. 1957) 16

Washington v. *Texas*, 388 U.S. 14 (1967) 18

In The

Supreme Court of the United States

October Term, 1973

No.

ANIELLO DELLACROCE,

Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner, Aniello Dellacroce, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 21, 1974.

Opinion Below

The opinion of the Court of Appeals is not yet reported but is reprinted in our Appendix A.

Jurisdiction

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty on January 24, 1973 under a three-count indictment charging income tax evasion, the filing of a false return and conspiracy to evade taxes in violation of 26 U.S.C. §§7201, 7206 and 371 of Title 18. On April 2, 1973 the petitioner was sentenced to five years' imprisonment.

On January 21, 1974 the Court of Appeals for the Second Circuit affirmed petitioner's conviction. This Court extended the time for filing a petition for certiorari until March 22, 1974. The jurisdiction of the Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the government failed to affirmatively establish an independent source of evidence for petitioner's indictment after he had been granted transactional immunity and testified fully before a state grand jury.

2. Whether the petitioner was unconstitutionally convicted of tax evasion for failure to report the alleged receipt of stock never registered in his name, never possessed by him, and which was being held in escrow subject to adverse claims.

3. Whether the government's refusal to allow full disclosure of facts needed to impeach the prosecution's chief witness denied petitioner the right of confrontation.

Constitutional Provisions Involved

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutes Involved

Sections 7201 and 7206 of Title 26 and Section 371 of Title 18 of the United States Code pertain to this case and are reprinted in our Appendix B.

Statement of Facts

In 1970 petitioner was called before a New York County grand jury investigating, among other things, his acquisition of and state tax liability for certain corporate stock (GJ 860).[1] Full transactional immunity was granted petitioner, who was forced to testify concerning: his employment with the other named conspirators in his federal tax case; meetings at the Ravenite Social Club in New York City; his work efforts and how he supported himself, and whether he maintained bank accounts and safe deposit boxes; the times and places of his meetings with other named conspirators; and whether he arranged "labor peace" and received shares of stock that he appropriated to his own use (GJ 945, 942, 988)

After petitioner furnished this information to the state grand jury, the Assistant District Attorney in charge of that investigation joined the Justice Department and presented petitioner's tax case to a Southern District federal grand jury. Petitioner was thereafter indicted for income tax evasion.

The Tax Case

The government claimed that in 1968 petitioner received 22,500 shares of Yankee Plastics stock for arranging "labor peace." In 1968 Yankee Plastics, Inc. and Mr. Hanger, Inc. merged. Both were manufacturers of plastic hangers for the garment industry in New York City. During the merger negotiations, Lawrence Rosen was striving to gain control of the newly formed company (1203).[2] To achieve this purpose, Rosen acquired 22,500 shares of stock and registered it in the name of a nominee (Preston Smith) to escape certain restrictions

---

[1]Refers to pages of Defendant's Exhibit A, petitioner's grand jury testimony before New York County grand jury.

[2]Refers to petitioner's appendix in the Second Circuit Court of Appeals.

on its resale (1199-1200, 1532-1533). This is the very same stock that the government charged petitioner owned.

Rosen testified that he was free to do with this stock as he pleased, and that he did not know the petitioner and has never met him (1535, 1538). He swore he never heard that these shares were being held for petitioner. Rosen has continuously endeavored to recover these shares, which he claims belong to him (1553).

Frank Terranova, the government's chief witness, stated that Martin Goldman told him that the 22,500 shares were being held for petitioner for assistance with some labor problems (157). However, Terranova sold 7,500 shares of this stock as his own, for which he received $22,261.85 (252). He admitted before the SEC that he used that money for his own purposes (395).

During 1968 and 1969 at least three other persons claimed the stock: Larry Rosen, the Chairman of the Board of Yankee Plastics, Inc.; Joseph Abrams, a former shareholder; and Frank Terranova. Terranova deposited the shares remaining from the sale with his attorney, stating that these were his certificates (1020). Terranova's lawyer held his stock for over a year. He then released it to Terranova's wife based upon his written authorization, which provided in part:

> "Upon the sale of these certificates by my wife, it is requested that you make arrangements for the payment of federal and state taxes." (Govt. Exh. G-11)

Terranova's wife then delivered the shares to Martin Goldman who surrendered them to his attorney where they have remained ever since.

Unquestionably, petitioner never physically received the stock, nor did he ever possess it. The stock has never been sold, nor has anyone, save Terranova, profited from it. Nevertheless, petitioner has been sentenced to five years' imprisonment for failing to report the 22,500 shares of stock as income in the year 1968.

REASONS FOR GRANTING THE WRIT

POINT I

The government failed to affirmatively establish an independent source of evidence for petitioner's federal indictment after he had been granted transactional immunity and testified fully before a state grand jury.

The issue which dominates this case involves petitioner's state grant of immunity, which the government violated by using that compelled testimony to obtain a federal income tax indictment. The Second Circuit's approval of the government's shameful tactics used in this case has gravely undermined this Court's rule in *Kastigar* v. *United States*, 406 U.S. 441 (1972). Thus, the fifth amendment has suffered a staggering setback under the impact of the Second Circuit's decision.

It is uncontroverted that petitioner was compelled to disclose the following facts under a state grant of immunity:

> (1) that he worked for Martin Goldman (a named conspirator in his federal tax case) and that he had known him for about five years and worked for him personally;
>
> (2) that he met Martin Goldman through Michael Catalano (another named conspirator in the federal tax case) and that he had met with Martin Goldman at the Ravenite Social Club 'many times' (GJ 884, 891, 901);[3]
>
> (3) that he was paid $200 a week and reported directly to Goldman;
>
> (4) that he had no other source of income, and that he maintained no bank accounts or safe deposit boxes;

---

[3]Each of these crucial omissions appears as an overt act in petitioner's federal indictment.

(5) that he met with the conspirators named in his federal indictment at particular times and places (GJ 988);

(6) that his job duties with Goldman were discussed at the Ravenite Social Club (GJ 940);[4]

(7) that he had been to the offices of the 20th Century Industries with Michael Catalano;

(8) that he was asked whether he arranged labor peace for these companies and whether he had received shares of stock and appropriated them to his own use (GJ 945, 942).[5]

These facts are illustrative only and by no means exhaust the state grand jury testimony. Petitioner testified for a full day before a state grand jury and answered over 278 questions. *See* Defendant's Exhibit A.

Same Prosecutor in Both Cases

The same New York prosecutor, William Aronwald, who interrogated petitioner before the state grand jury later became the government attorney who presented petitioner's tax case to a federal grand jury and later prosecuted the indictment in federal court. Before the Justice Department hired Aronwald, they discussed with him his earlier experience in the state investigation of petitioner. He was assigned to petitioner's tax investigation because of his "familiarity" with the state proceedings (89).

Aronwald admitted that while he was conducting petitioner's state investigation he knew there was a federal tax investigation

---

[4]These meetings at the Ravenite Club played a prominent part in petitioner's income tax trial.

[5]The government's tax indictment charged him with receiving 22,500 shares of stock for arranging labor peace between these New York firms.

pending against him (9). He conceded that during the state investigation he exchanged information with the federal authorities concerning their joint efforts against petitioner (9).

Perhaps the most harrowing and revealing fact to emerge from this grim record is Aronwald's admission that after he began prosecuting petitioner's federal tax case, he returned to the New York prosecutor's office and obtained all the records relating to that investigation and transported them to the federal prosecutor's office.[6] Defense counsel, stunned by this revelation, asked:

> "The reason for that, to bring that over to the federal jurisdiction, was, of course, to assist you in your investigation and the culmination of that investigation in the federal jurisdiction, isn't that true? A. That is correct." (48, 49)

In view of the shocking circumstances of this case, petitioner moved to dismiss the tax indictment because his constitutional privilege against self-incrimination was breached by the use of his state grand jury testimony in obtaining the federal tax indictment and conviction. A hearing was conducted to investigate these claims and William Aronwald denied, with a straight face, that he ever used any of the information acquired from petitioner before the state grand jury (12). He gratuitously volunteered that he already knew most of the information supplied by petitioner to the state grand jury (12).

---

[6]Many other witnesses were questioned before the state grand jury subsequent to petitioner's appearance (54). Aronwald was asked whether they were called after petitioner (54, 55). It was shown that after petitioner testified these other witnesses were called and questioned about the same subject matter (58). Counsel unsuccessfully demanded the diaries and records taken from the New York County District Attorney's office relating to this case on the grounds that they directly related to the claims here and because the witness testified he did not use any leads from these materials.

The *Kastigar* Rule

In *Kastigar* this Court demonstrated an awareness that persons testifying under a grant of "use" immunity risk ambush by other law enforcement groups lurking nearby. The Court, therefore, placed a very heavy burden on prosecutors requiring them to demonstrate that the immunized testimony was not used in any way, and warned them in unmistakable language:

> "This burden of proof, which we reaffirm as appropriate, is not limited to negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." (406 U.S. at 460)

The Court was careful to point out that a person accorded immunity and subsequently prosecuted "... is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." (406 U.S. at 460.)[7]

---

[7]This Court's disenchantment with government assurances of this nature is probably based upon the history of undisclosed electronic surveillance wherein unreliable and unfortunate representations were made. As a consequence, the Court understandably has become distrustful of these warranties even though in some instances they have been made in good faith. The difficulty of tracing even direct use of compelled testimony to evidence introduced in a trial was well documented by Mr. Justice Marshall in his dissent in *Kastigar*. Even ignoring the possibility of intentional misconduct on the part of prosecuting authorities, there would seem to be at least a significant possibility of accidental or knowing use of the compelled testimony. Given the complexity of the modern day investigative and prosecutorial bureaucracy, it is not at all inconceivable that evidence or information that is apparently derived from a wholly independent and legitimate source, may in fact result from some prohibited use of the compelled testimony. The U.S. Attorney handling the actual prosecution of the case may, in complete good faith, swear that no information used in preparing the trial, nor any evidence to be presented in the trial, was in any way derived from the immunized testimony and be totally unaware that someone of the oft-times dozens of persons who work on a prosecution has somehow used the protected testimony. *Kastigar* v. *United States*, 406 U.S. 441, 469 (1972), dissenting opinion of Mr. Justice Marshall.

In direct defiance of the *Kastigar* rule, the government here merely *denied* their use of petitioner's compelled testimony and asked the court to rely upon its good faith.[8]

Here, the state prosecutor, who was privy to petitioner's compelled testimony and all the leads derived therefrom, became the prosecutor who presented petitioner's case to the federal grand jury and convicted him in federal court. The very reason he was assigned to petitioner's case was his "familiarity" with the state prosecution.

In *Kastigar* this Court stressed in tough-minded language as follows:

> "... total prohibition on use provides a comprehensive safeguard, barring the use of compelled testimony as an 'investigatory lead,' and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures." (406 U.S. at 460; footnote omitted.)

Because the very same prosecutor who conducted the state grand jury investigation undertook the federal prosecution, there was a grave danger that his intimate understanding of petitioner's grand jury testimony either consciously or unconsciously influenced the "focusing" of the federal tax investigation.[9]

---

[8]Mr. Justice Douglas and Mr. Justice Marshall expressed their grave misgivings about the workability of this rule and predicted dire consequences flowing from the rule's application. The melancholy forecast registered in their dissents has all too soon been fulfilled. For clearly here the prosecution has run roughshod over this Court's carefully constructed rule and left it in a shambles.

[9]For instance, petitioner in 25 pages of grand jury testimony, was required to describe in detail his duties while working for Goldman. After this thorough investigation by Aronwald, one could reasonably expect that he had no fear that petitioner would be able to explain what he did for the $200 a week received from Goldman. Petitioner's testimony on that subject effectively foreclosed him from taking the stand.

[Footnote continued on following page]

The Second Circuit's Misconstruction of the *Kastigar* Rule

The Second Circuit has regrettably misconstrued the *Kastigar* rule by stating, "[T]he previous grant of immunity places upon the government a heavy burden of proving that the indictment did not stem from the information given to the grand jury." (Appendix A at A-5.) Thus, their reliance upon this faulty premise undermines that court's ultimate conclusion. For this Court decreed in *Kastigar* that the compelled evidence must not be used in *any* fashion. And the prosecution never produced any evidence establishing an independent source of evidence to support petitioner's tax charges.

The Second Circuit's suggestion that the government "carr[ied] the affirmative burden of proving a legitimate independent source of evidence" is both inaccurate and disappointing. The government merely denied ever using petitioner's grand jury testimony.[10]

[Footnote continued from preceding page]

Furthermore, petitioner was forced to admit before the state grand jury that he had not been employed since he left Martin Goldman's company in April of the previous year; that he had no bank accounts, no safe deposit boxes, nor any bank accounts in his wife's name; had no money; and was living on the money he had saved (GJ 944, 946). Thus Aronwald was virtually assured that petitioner could not testify in his income tax trial. Other ways this information was effectively used are innumerable. These are but a few of the most obvious examples of how petitioner's testimony was effectively used to indirectly obtain his conviction.

[10]The Court of Appeals' unusual proposal that Aronwald's asking of leading questions verified his pre-existent knowledge of certain facts is ill-considered. Any lawyer worth his salt will often ask leading questions in hope of obtaining an answer favorable to his cause without knowledge of the answers sought. This is particularly true in an investigatory setting. In any event, the asking of a leading question hardly sustains the "heavy burden" of demonstrating an independent source of evidence for petitioner's tax indictment. And even if Aronwald knew of some of the information supplied to the grand jury, petitioner's certification of that evidence was surely valuable to the prosecution.

The Second Circuit's suggestion that petitioner was circumspect in answering questions before the grand jury is irrelevant. Petitioner was asked and answered 278 questions before the state grand jury and was convicted of contempt for refusing to answer only five. His declining to answer a number of those questions was on the advice of counsel and based upon constitutional grounds.

Conflict in Circuits

The Second Circuit stands alone in its serious modification of this Court's rugged rule in *Kastigar*. Both the Eighth and Fifth Circuits have reached the opposite conclusion in identical cases.

In *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), the defendant obtained transactional immunity under state law and was subsequently prosecuted by federal authorities for related matters. Prior to the federal indictment, the United States Attorney read McDaniel's state grand jury testimony. In *McDaniel* the government produced voluminous FBI reports showing a completely independent source of the evidence adduced at McDaniel's trial. However, the Eighth Circuit concluded that those reports failed to satisfy the government's heavy burden of proving that the prosecutor, who had read McDaniel's grand jury testimony, did not use it in some significant way short of introducing the tainted evidence in his trial.[11] Our case is no different.

In *United States* v. *Seiffert*, 463 F.2d 1089 (5th Cir. 1972), the defendant was convicted of misappropriating funds of a federally-insured bank. The Fifth Circuit decided that the prosecutor's conclusory statements that no use was made of defendant's immunized bankruptcy testimony was insufficient to sustain the government's burden under *Kastigar*.[12] Both the Fifth and Eighth Circuits have adhered closely to the *Kastigar* rule, whereas the Second Circuit has slipped its moorings and has drifted dangerously far away from this constitutional principle.

---

[11] The Eighth Circuit stressed:

> "... such use could conceivably include assistance in focusing the investigation, deciding to initiate the prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." (482 F.2d at 311)

[12] *See also United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *In re Cardassi*, 351 F. Supp. 1080 (D. Conn. 1972); and *In re Minkoff*, 349 F. Supp. 154 (D.R.Is. 1972), where courts dealing with different factual situations have adhered to the strong burden of proof imposed upon the government under *Kastigar*.

The only way the *Kastigar* rule can be effectively enforced where the same prosecutor has participated in both federal and state investigations is by complete exclusion. Thus in this case, because of their failure to prove an independent source of evidence the indictment must be dismissed. Otherwise, the *Kastigar* rule is emasculated.[13] Once it is established that the same prosecutor has been made privy to the state and federal investigations, and in particular, something as critical as grand jury testimony, the hazards of unconscious use of this information are obvious. Understandably, the Court must distrust a prosecutor's wide-eyed assurances that he never used this information, for such a statement defies reality.

It is a dreadful situation where a state prosecutor, after forcing a person to testify before a state grand jury under a grant of immunity concerning his tax liability, races across the street and secures a federal indictment for income tax evasion. This sad spectacle hardly instills a sense of confidence in the doctrine of use immunity conceived by this Court to leave the witness "... in substantially the same position as if the witness had claimed the fifth amendment privilege." If this Court gives in to the government's dismantling of the use immunity rule, there will be no end to the debasement of that doctrine.

This case confirms our worst suspicions of how use immunity grants can be abused by the government. The only protection against this form of subversion lies in the strict adherence to the well-formulated rule forged by this Court requiring the government affirmatively to establish all independent sources of evidence and not to use in *any* way the compelled testimony.

---

[13] As a practical matter, it would seem the only way to guarantee the government did not profit in any way from the witness' testimony would be to require that the government be limited in a subsequent prosecution to evidence obtained prior to the granting of immunity. Short of that, at a minimum, the transcript of immunized testimony must not be available to the U.S. Attorney actually preparing and prosecuting the case. *See Standards for Exclusion in Immunity Cases After Kastigar and Zicarelli*, 82 Yale L.J. 171 (1972); *The Scope of Testimonial Immunity Under the Fifth Amendment; Kastigar* v. *United States*, 6 Loyola L. Rev. 350 (1973).

Unless this Court reinforces the doctrine of use immunity and strikes down the Second Circuit's decision, no witness will ever be safe. For all these reasons the petition for certiorari should be granted.

POINT II

The petitioner was unconstitutionally convicted of tax evasion for failure to report the alleged receipt of stock never registered in his name, never possessed by him, and which was being held in escrow subject to adverse claims.

Petitioner's conviction raises the gravest constitutional doubts because it imposes criminal tax liability on a person for the receipt of stock which was held in trust for someone else. The government's evidence indisputably demonstrated that petitioner never possessed or controlled the Yankee Plastics stock and others continuously asserted adverse claims to those very shares. The government was bound to prove beyond a reasonable doubt:

(1) that the stock was actually received by petitioner or that he had control of it not subject to substantial limitations or restrictions; and

(2) that it was received as compensation for services performed in 1968.[14]

---

[14]The government completely failed to prove that petitioner performed any services for this stock. Proof showing Michael Catalano's assistance in settling certain minor labor grievances, for which he was paid a salary, could not be imputed to petitioner. And Terranova admitted that he did not know what services petitioner supposedly performed for the stock (191). Since the stock became income only if it was "compensation for *services*," and since no services were shown, the stock was not income even if it had been received. Internal Revenue Code, §61(a)(1).

Internal Revenue Code, §61 (gross income defined) provides in pertinent part:

> "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commission, and similar items; . . . ."

Throughout the taxable year of 1968, the stock was registered in the name of a nominee for several persons other than petitioner. Even Terranova conceded on *direct* examination that the stock was being held in trust for Joseph Abrams.

After Lawrence Rosen, a "control person" who admitted that the stock was his to do with as he pleased (1555), had a dispute with Joseph Abrams in the Lewisburg Federal Penitentiary, the stock was placed in "escrow or in trust" for Abrams until his release from prison (1585). That view was confirmed by Richard Bertoli (1163).[15]

Regrettably, the Court of Appeals erroneously applied a theory of constructive receipt to uphold petitioner's conviction. However, the government's own regulations make this position untenable.[16]

---

[15] In light of this compelling proof developed by the government, the trial court was prompted to ask:

> "I am troubled by something today, Mr. Aronwald. Is it the government's position that when those 22,500 shares were acquired from Meyers in 1968 they were then under the dominion and control of Aniello Dellacroce? Because that is what you have charged him with. [Prosecutor answered yes.]. . . But you are bringing out all this stuff about an unsettled situation. . . . What you are bringing out now is that the matter seems not to have been settled." (1456-1457)

[16] Internal Revenue Code Regulation, §1.451-2(a) states the general rule as follows:

> "Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available *so that he may draw upon it at any time* or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, *income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.*" (Emphasis added.)

This regulation is so clear that few cases have ever arisen since its adoption in 1957. Where an existing dispute prevents the taxpayer from having *complete* control over the property, it cannot become income to him until the controversy is resolved. *Estate of Margaret Allen Fairbanks*, 3 T.C. 260 (1944); *Daniel H. Deutsch*, 26 T.C.M. 649 (1967). *See also, Estate of Jacob M. Eisenberg*, 6 T.C.M. 771 (1947); *Big Lake Oil Company* v. *Commissioner*, 95 F.2d 573 (3d Cir. 1938).

In *Commissioner* v. *Edwards Drilling Co.*, 95 F.2d 719, 720 (5th Cir. 1938), the court stressed that: "strained construction in administrative efforts to accrue income should be avoided." Here the *government's* uncontradicted proof showed:

(1) the stock was not registered in petitioner's name;

(2) petitioner never possessed the stock;

(3) from April 2 until August 2, 1968 the stock was owned by Rosen and under his exclusive control;

(4) from August 2, 1968 into 1969 the stock was held by Goldman in trust for Joe Abrams;

(5) in 1968 the stock could not be sold because of the stop order that had been placed against it;

(6) petitioner was unable to exercise any control over the stock.

Even Terranova's testimony showed that all attempts to sell the stock in 1968 proved unsuccessful because it was being held in trust to settle Abrams' claim. These steel-hardened facts compel the conclusion that this stock certainly did not belong to petitioner and, consequently, he was not responsible for its tax.[17]

When it is impossible to violate the substantive charge in an indictment, any related conspiracy charge must also fail.[18]

If this conviction is allowed to stand undisturbed, our judicial history of the tax law will never recall any episode so critical in character and so expansive in scale. Such a decision is bound to carry implications and give direction far beyond the facts of this case. For all these reasons the petition for certiorari should be granted.

---

[17] Had Aniello Dellacroce in 1969 consulted with the most able tax lawyer in New York concerning his obligation to pay a tax on this stock being held in trust for someone else, it is inconceivable that he would have been advised to report this stock as income.

[18] *See Ingram* v. *United States*, 360 U.S. 672 (1959); *Lubin* v. *United States*, 313 F.2d 419 (9th Cir. 1963); *Ventimiglia* v. *United States*, 242 F.2d 620 (4th Cir. 1957); *O'Kelley* v. *United States*, 116 F.2d 966 (8th Cir. 1941).

POINT III

The government's refusal to allow full disclosure of facts needed to impeach the prosecution's chief witness denied petitioner due process of law.

Throughout petitioner's trial there were many occasions when the court stood by the government's defiance of defense counsel's efforts to secure information critical to the impeachment of Frank Terranova — the only witness who involved petitioner in these tax charges. At the close of Terranova's direct testimony, the government developed that he was under indictment for accepting bribes as a government procurement officer. Everyone in the courtroom, including the trial judge, was stunned when the government asked Terranova whether he was *guilty* of those charges. Terranova brazenly replied that he was "not guilty!"[19] Consequently, defense counsel could not avoid a full scale attack against the government's irresponsible effort to bolster their sole witness' credibility.[20]

Each of the defense attempts to obtain information that would have seriously, if not conclusively, disabled Terranova's

---

[19]Terranova had been indicted by the United States Attorney's office in the Southern District of New York for unlawfully accepting bribes in the amount of $30,000 as a GSA procurement officer (341).

[20]These efforts included:

(1) service of a subpoena upon the government to produce their file, including the investigation of Terranova's criminal conduct;

(2) a demand and subpoena for the records of Jody Associates, a firm partly owned by Terranova which received the $30,000 charged in the bribery indictment;

(3) an attempt to cross-examine Terranova with an FBI statement concerning his relationship with Dellacroce, in which he never mentioned any meetings with Dellacroce at the Ravenite Club;

(4) a demand for surveillance logs maintained by Agent McGinley concerning his observation of the Ravenite Club and persons meeting there.

credibility was frustrated by the government and the court. Terranova's credibility was the most important issue raging in this trial, and the defense desperately needed all this evidence to show petitioner's complete lack of involvement in these charges.

When the prosecutor dramatically chose to have Terranova assert his innocence before the jury, he assumed the risk that his file would have to be disclosed under *Brady* v. *Maryland*, 378 U.S. 83 (1963). The government forfeited certain rights of non-disclosure which ordinarily might have prevailed when they made this drastic choice.[21] At the very least, the defense was entitled to have the court examine the file and divulge that which would have been helpful in cross-examination. *Washington* v. *Texas*, 388 U.S. 14 (1967).[22]

Until government prosecutors are taught that these tactics will not be tolerated, no defendant is secure. If equal protection of the law is to have any meaning at all, this petition should be granted.

---

[21] Keeping in mind the government's astounding record for convictions in the Southern District, we must assume that it had within its file ample evidence to prove Terranova's guilt beyond a reasonable doubt. Significantly, on April 30, 1973, after petitioner's trial, the United States Attorney in charge of the prosecution of Frank Terranova stated in open court to Judge Edelstein, "I offered to in effect throw open the entire file of the government on this specific case" to Mr. Lipson (Terranova's defense counsel) and he "has on numerous occasions been down to my office to take advantage of that opportunity . . . ." (*United States* v. *Frank Terranova*, S.D.N.Y., 71 Crim. 332; T-8) It is hard to understand why the same courtesy was not extended to defense counsel here.

[22] In *Washington* the Court wrote:

> "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." (388 U.S. at 19)

This Court's recent decision in *Davis* v. *Alaska*, U.S. , 14 Cr.L. 3117, decided February 27, 1974, compels the grant of this petition. In *Davis* the Court concluded that petitioner was denied his right under the confrontation clause to adequately cross-examine the prosecution's chief witness. In reversing Davis' conviction the Court emphasized:

> "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (14 Cr.L. at 3120)

This Court decided in *Davis* that, ". . . the State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." (14 Cr.L. at 3121.)

Our situation is the same. The government's interest in keeping confidential their file containing the evidence of Terranova's criminality cannot be withheld in derogation of petitioner's right of confrontation. This is particularly so when the prosecution is instrumental in having the witness assert his innocence. Surely the policy considerations present in *Davis* were far more compelling than those urged by the government here. Consequently, the petition for certiorari should be granted.

Conclusion

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

Herald Price Fahringer, Esq.
One Niagara Square
Buffalo, New York 14202
(716) 856-8400

Joseph Panzer, Esq.
305 Broadway
New York, New York 10007
(212) 962-2243

Counsel for Petitioner

Lipsitz, Green, Fahringer,
Roll, Schuller & James
Of Counsel.

APPENDICES

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 199, 237, 303—September Term, 1973.

(Argued September 26, 1973 Decided January 21, 1974.)

Docket Nos. 73-1559, 73-1984, 73-1985

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL CATALANO, MARTIN GOLDMAN, and ANIELLO DELLACROCE,

Defendants-Appellants.

Before:

MANSFIELD, MOORE and OAKES,

Circuit Judges.

Appeal from judgments of conviction for conspiring to evade income taxes and, in the case of appellant Dellacroce, for evading income taxes and for filing a false return, entered in the United States District Court for the Southern District of New York, after a trial before Arnold Bauman, *Judge,* and a jury.

Affirmed.

HERBERT I. HANDMAN, New York, N. Y., *for Appellant Catalano.*

NEAL J. HURWITZ, New York, N. Y., *for Appellant Goldman.*

HERALD PRICE FAHRINGER, Buffalo, N. Y. (Joseph Panzer, New York, N. Y. of counsel), *for Appellant Dellacroce.*

SHIRAH NEIMAN, Assistant United States Attorney, New York, N. Y. (Paul J. Curran, United States Attorney for the Southern District of New York, New York, N. Y., Robert P. Walton, James E. Nesland, Michael B. Mukasey, Richard Wile, John W. Nields, Jr., Assistant United States Attorneys, of counsel), *for Appellee.*

MOORE, *Circuit Judge:*

Aniello Dellacroce, Michael Catalano and Martin Goldman appeal from judgments of conviction entered against them in the United States District Court for the Southern District of New York after a jury trial and from orders denying motions for a new trial. The indictment contained three counts. Count ONE charged a conspiracy amongst the three defendants and certain non-defendant co-conspirators to evade income taxes due from Dellacroce to the United States for the calendar year 1968 (26 U.S.C. §7001, 18 U.S.C. §371). Count TWO charged Dellacroce with filing a false tax return for that year (26 U.S.C. §7201). Count THREE charged Dellacroce with making and subscribing a false tax return wherein "wages, salaries, tips, etc." were stated as $10,400 whereas in fact and to his knowledge they were $134,500 (26 U.S.C. §7206(1)). All three defendants were convicted of conspiracy; Dellacroce, in addition, was found guilty of false filing and tax evasion.

Many trial errors are asserted by the defendants; many overlap. To the extent that they are claimed to apply only

to one of the defendants, they will be considered as to him alone.

The Conspiracy

The gist of the conspiracy to enable Dellacroce to defraud the government of income taxes is that in 1968 Dellacroce allegedly received 22,500 shares of Yankee Plastics, Inc. stock (valued at approximately $123,000) for services rendered by Dellacroce and Catalano (1) to help Yankee Plastics, Inc. acquire a company known as Mr. Hanger, Inc. and (2) to insure "labor peace" for Mr. Hanger, Inc. In order to avoid showing this stock as income to Dellacroce (and hence to evade a tax to him), devious means were employed. The 22,500 shares were placed in the name of a nominee, Preston Smith. The certificates representing these shares were never in the physical possession of Dellacroce. Thus the government's case is based upon his dominion and control of the shares and his resultant constructive possession.

To trace the physical custody of the 22,500 shares requires the introduction of other persons, Rosen, Goldman, Terranova and Catalano.

Rosen and Goldman, using Preston Smith as a nominee, purchased 15,000 shares of Mr. Hanger, Inc. which, upon its merger with Yankee Plastics, became 22,500 shares of that company's stock. In the summer of 1968, Goldman told Terranova, the government's chief witness and through whom these transactions became known, that the shares were being held for Dellacroce in Smith's name so that Dellacroce would not have to report them as income. Goldman requested Terranova to replace Smith as nominee. Accordingly, the single certificate for the 22,500 shares in Smith's name was cancelled and forty-five 500-share certificates, issued in Smith's name but endorsed by Smith

with a signature guarantee, were delivered by Goldman to Terranova. The stock was now in negotiable form.

Goldman and Terranova then opened an account, still using Smith's name, with Francis I. duPont and Company and deposited the 22,500 shares there.

Catalano enters the picture, according to Terranova's testimony, as an accomplice and employee of Dellacroce.

During the ensuing months, there were many meetings between Goldman and Terranova on the one hand and Dellacroce and Catalano on the other, at which the stock, still in the brokerage account, was discussed. Dellacroce was advised not to sell since it was thought that Yankee Plastics was doing well. However, the stock was eventually removed from the duPont account and kept in offices at 312 Fifth Avenue, maintained by a company operated by Goldman and Terranova. In May 1969 they (Terranova and Goldman) put 7,500 shares into an account with First Hanover Corporation. In June 1969 4,000 shares were sold, realizing some $21,000. The remaining 3,500 shares were delivered to Terranova. In November 1969 the balance of the 22,500 shares (37 certificates for 500 shares each) were delivered into the custody of a private attorney, and in March 1971 they were released to Terranova's wife who, in turn, gave them to Goldman. The 37 certificates finally reappeared via Goldman's attorney at the trial, ostensibly from Goldman.

The theory of the government's case is that Dellacroce received the stock in 1968 in payment for services rendered by him and his assistant, Catalano, to insure labor "peace" and to aid in the merger of Mr. Hanger and Yankee Plastics. Despite the many resting places of the stock and the inferentially suspicious character of the methods employed, the fundamental appellate question is centered around the testimony that the stock was given to Dellacroce for his services and was handled in such a

way as would enable him to evade income taxes thereon. There was much embellishing proof which would support inferences to this effect but essentially the case rests upon jury belief or disbelief in Terranova's testimony. It chose to believe. It also chose to believe the involvement of Goldman and Catalano. Each appellant, however, raises particular points of alleged trial error which must be considered separately.

Dellacroce

Dellacroce argues that in his previous appearance before a New York County grand jury he received transactional immunity regarding events relating to the subject matter of the present indictment. This previous grant of immunity places upon the government a heavy burden of proving that the indictment did not stem from information given to the grand jury. If this were not so, a defendant's Fifth Amendment rights would be considerably abrogated, *Kastigar* v. *United States,* 406 U.S. 441 (1972). The problem is complicated in this case by the fact that the County Assistant District Attorney who interrogated Dellacroce before the grand jury transferred from the County to the Federal prosecutor's office and in part presented this case to the Federal grand jury. In this case, however, that burden was met. Dellacroce's testimony before the grand jury was circumspect in the extreme; so much so that he was cited for contempt. Further, the large bulk of the questions were of a leading nature from which it may be concluded that the prosecutor knew what the response would be. This conclusion is buttressed by an affidavit of Goldman dated before the grand jury hearings, covering the subject matter of several of the questions.

A hearing on Dellacroce's motion to dismiss the indictment led the Court to conclude that nothing material had

been disclosed in Dellacroce's County grand jury testimony which provided the Federal prosecutor's office with either information or leads. In keeping with the mandate of *Kastigar* the proof, which included testimony by the former County (and later Federal) prosecutor, not only negatived any possibility of taint, but also carried the affirmative burden of proving a legitimate, wholly independent source of evidence. In the face of this showing Dellacroce would have us hold that access to grand jury testimony *ipso facto* prevents the government from carrying its burden under *Kastigar*. This we decline to do. Neither *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), nor *Kastigar* v. *United States*, 406 U.S. 441 (1972), purports to establish such a peremptory rule. *United States* v. *McDaniel*, 482 F.2d 305 (8th Cir. 1973), relied upon by Dellacroce, is clearly distinguishable. The defendant there, in his prior testimony before the State grand jury, had poured forth three volumes of self-incriminating testimony. The court sensibly concluded that the United States Attorney who read this testimony in its entirety could not wholly obliterate it from his mind in his preparation and trial of the federal case. Furthermore, unlike the present case, the United States Attorney there made no attempt to show that he had prior knowledge of the information revealed by the grand jury testimony and his offer of F.B.I. reports as proof of an independent source failed to satisfy the burden of showing that he had not used the testimony in some significant way short of introducing it. By way of contrast the prosecutor here established that he had prior knowledge of substantially all the information covered in the Dellacroce testimony, thus foreclosing the possibility that he made "any use, direct or indirect, of the compelled testimony and any information derived therefrom." *Kastigar* v. *United States*, 406 U.S. at 460. A review of the record supports this conclusion. The *Kastigar* rule is aimed at

preventing the misuse of information gained under a grant of immunity; it does not require information not gained in this fashion to be discarded. The motion to dismiss the indictment was properly denied.

Dellacroce next argues the question which to him "dominates this appeal" (Dellacroce Br. p. 27). He states that he "cannot be convicted of income tax evasion for failure to report the alleged receipt of stock which was not registered in his name, which was never possessed by him, and which was being held in escrow subject to adverse claims." He is, of course, correct that he is not taxable for income that he never received. However, the test of receipt is not the registering of the stock in one's name. This contention ignores the entire theory of conspiracy and of constructive possession. Were Dellacroce's contention correct, anyone wishing to shelter income could have it paid to a nominee and kept in the custody of another. Thus, it was for the jury to decide whether he possessed it or not. Likewise, the contention that the stock was subject to adverse claims, sufficient to prevent his constructive possession, was one properly submitted to the jury and decided by them.

Dellacroce further alleges that there was error in the admission of a statement by Goldman which stated in part that he knew Dellacroce, employed him, met with him at the Ravenite Club, knew him to meet there with Catalano, and knew the relationship between Dellacroce and Catalano. It is contended that under the rule of *Bruton* v. *United States,* 391 U.S. 123 (1968), this statement should have been excluded. However, this argument disregards the fact that independent evidence was presented to support each factual proposition made by Goldman, linking Dellacroce to the conspiracy. *Bruton* extends only to situations where "the testimony concerning the complaining co-defendant is clearly inculpatory . . . and (2) the testimony is vitally

important to the government's case." *United States* v. *Cassino*, 467 F.2d 610, 623 (2d Cir. 1972), *cert. denied*, 410 U.S. 928 (1973). In this case the complained-of testimony was merely repetitive of other evidence, and the careful admonitions of the judge that the jurors consider the Goldman statement only against him makes any improper use of the statement highly unlikely.

Dellacroce next contends that evidence concerning a gambling trip allegedly made by him to Puerto Rico in 1968 under an assumed name was irrelevant to the present case and thus improperly admitted. The government argued that the evidence was proper in that it was probative of Dellacroce's intent to evade taxes, certainly an important element of the charged offense and, on this basis, it was admitted. A gambling "junket" usually has one of two results—profit or loss. If profit were the result, an alias would be useful to hide the gain from scrutiny by the I.R.S. Thus, it might well be that the use of an alias during a gambling trip made in the year of the alleged tax evasion bears on the intent to evade tax. Of course, there might be several alternative reasons why Dellacroce may have used an assumed name. His counsel was free to suggest any of these or to offer evidence that Dellacroce did not go to Puerto Rico at all in that year or that he did not do so under an assumed name. However, the fact remains that the use of an alias under the circumstances is relevant to an intent to evade taxes although it is certainly far from conclusive. The degree of relevancy required for admissibility is one that generally is determined in the discretion of the trial court—a discretion correctly employed here.

An allied argument raised by Dellacroce is that the prejudicial implications of this evidence outweighs its probative worth. It is stated that "[t]his condemning evidence became a 'damned spot' on appellant's case of which

he could not rid himself." (Dellacroce Br. p. 42). Certainly, potential prejudice to the defendant is a factor to be considered in weighing the pros and cons of admitting a particular piece of evidence. For this reason evidence of a prior crime may only be introduced in limited circumstances, C. McCormick, A Handbook of the Law of Evidence, §157 (1954). In this case, however, the actions of Dellacroce did not constitute a crime since he did not, in fact, win any money. Thus, the trial judge was not faced with the problem of a prior criminal act. This, however, did not relieve him of his general duty to balance probative worth against potential prejudice. The lengthy dialogue between judge and prosecutor (312a-319a) concerning this bit of evidence, the instruction to the jury at the time of its submission to them (936a), and the charge to the jury on this matter (1701a) reveal the careful consideration given to the possibility of prejudice. Dellacroce contends that ". . . the prosecutor strategically waiting until the very end of the summation, lashed out at the jury with his highly volatile evidence [the trip to Puerto Rico], searing it into their minds." (Dellacroce Br. p. 40). Nonetheless, the probative worth of this evidence, far from being "frivolous" as it was characterized by appellant, was properly presented for jury consideration. In general, it is for the trial judge to do the balancing required here and it cannot be said that his discretion was misused.

Another issue raised is whether Dellacroce's motion for a new trial based on newly discovered evidence was properly dismissed without a hearing. This evidence consisted of testimony suggesting that Dellacroce did not make the trip to Puerto Rico in 1968. The judge, after learning the nature of the evidence and its source, denied the motion without a hearing on the grounds that the evidence was not newly discovered. Motions of this sort are not

held in great favor. *United States* v. *Costello,* 255 F.2d 876 (2d Cir.), *cert. denied,* 357 U.S. 937 (1958). In light of the facts in this case, there is no reason to believe that the court erred.

Finally, Dellacroce contends that the government improperly withheld information that would have helped to impeach Terranova, the government's chief witness. The information consisted of a government file on Terranova, gathered in relation to an unconnected bribery indictment against him, the records of Jody Associates, which also related to this indictment, and the logs of surveillance made in 1967 and 1968 on the Ravenite Club, a meeting place of the alleged conspirators. In addition there is a claim of error in regard to sustaining a government objection to a defense question put to Terranova in an attempt to impeach him. To deal with the files relating to the bribery indictment, the trial court, after a representation by the government that their file contained nothing on the defendant's guilt or innocence, and after its own inspection of the corporate files which also revealed nothing, denied the request for inspection. There is no doubt that this decision was proper. The defense had had a full opportunity to examine Terranova at length concerning his alleged misdeeds. There was no abuse of discretion in the judge's preventing another case being tried in his court as part of an attempt to impeach a witness.

The surveillance logs, which were requested under 18 U.S.C. §3500, the Jencks Act, are related to the testimony in this trial of the agent who prepared them. He testified on his own recollection that the defendants frequented the Ravenite Club. The defense wanted the logs in an attempt to prove that Dellacroce did not attend the Ravenite Club on a particular occasion with Goldman, a meeting testified to by Terranova. The judge denied the

request for inspection of these logs on the grounds that they were not verbatim or substantially verbatim reports of statements made by a witness as required by §3500. The purpose of the Jencks Act was to provide the defense with the means of impeaching a government witness by means of a prior inconsistent statement, *United States* v. *Aaron*, 457 F.2d 855 (2d Cir. 1972), while not allowing an unrestrained search through government files. The determination of whether a particular document is within the ambit of §3500 is ordinarily one for the trial court whose ruling should not be disturbed unless clearly erroneous, *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966). In this instance, since the Agent did not testify that Dellacroce was present at the time stated by Terranova, the logs would be useless to impeach the Agent on this point. Further, these documents were not used to refresh the witness's memory before his testimony. The witness, in fact, admitted that he did not recall certain matters that could be found in the logs. Thus, it may be seen that these research surveillance logs are of the same nature as the Agent's diary as to the people he met with which has been held to be outside §3500 in *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966). Therefore, there was no error here.

With respect to the question put to Terranova as to which the objection was sustained, Terranova had been interviewed by an F.B.I. Agent on July 13, 1970. The Agent had recorded in writing his version in summary form of that interview (GX30 for identification). Terranova, after reading the statement, still persisted in his lack of recollection concerning the question being asked. Thereupon, the cross-examiner asked:

"Mr. Terranova, I ask you this question and if you will, please, answer it yes or no, if you can. You have just had occasion to read this F.B.I. report dated the 13th of July,

1970. Isn't it true that nowhere in this statement do you mention anything about meetings at the Ravenite Club on Mulberry Street with Mr. Dellacroce?" The government's objection to the question was sustained. The report was not in evidence. There was no foundation laid to show that Terranova had told the Agent about any meetings or that the Agent had recorded verbatim the interview. And the Agent, himself, could have been asked whether the report recorded all that was said. Furthermore, Dellacroce's attorney was given full opportunity to ask Terranova whether he had told the Agent about the meetings, of which opportunity he took advantage by asking specifically about three meetings inside the Ravenite Club, as follows:

"I ask you, Mr. Terranova, on July 13, 1970, when you spoke with Agent Hughes in the parking lot in Hicksville on that day, on July 13 for about 20 minutes, you did not tell him, did you, anything about three meetings inside the Ravenite Club with Mr. Dellacroce? Yes or no."

The answer was, "I sincerely don't recall, sir."

Dellacroce suffered no prejudice from this incident.

Goldman

Turning now to the arguments of appellant Goldman, it is contended that testimony given by a government witness to the effect that Goldman had committed a prior similar act to the one charge was improperly admitted. William Stone, the witness in question, testified that in 1965 he had been hired by Goldman for the sum of $200,000, payable in stock, to handle a labor dispute between the Teamster's Union and one of Goldman's companies. Shortly after that conversation, in a meeting with Catalano and Goldman, Stone was told that Catalano would handle the matter and that Stone should not pursue it further. The judge instructed the jury that this testimony could be considered

only as probative of Goldman's intent to conspire. Goldman contends that this evidence was irrelevant to the case at hand in that there was no labor dispute at all at Yankee Plastics, and that the testimony of Stone in no way suggests that Goldman knew of any intent to help Dellacroce or Catalano evade taxes. It is argued further that this evidence was highly prejudicial in that it revealed a prior criminal act. The government's response chiefly lies in the contention that this evidence had a direct bearing on whether Goldman intended the Yankee Plastics stock for Dellacroce and not for the various alternative purposes suggested by the appellants. Thus, it could well be argued the transfer would constitute income to Dellacroce and the various machinations with the stock could be taken as showing Goldman's knowledge of, and participation in, Dellacroce's attempt to evade taxes. On this theory, the evidence was properly admitted, *United States* v. *Glasser*, 442 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Goldman further contends that the prosecutor failed to disclose to his attorney evidence allegedly suggesting that the witness Stone had been paid for his testimony. The evidence consisted of tapes of several phone conversations between Stone and a government agent and one conversation between Stone and the prosecutor. These tapes came to light when Stone offered to sell them to Goldman for use in his efforts to reverse his conviction. It would serve no purpose to set out the contents of the tapes. It is sufficient to say that the judge below found that there was no merit in Goldman's claims and that such a finding is not unwholly supported by the evidence, *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.) *cert. denied*, —— U.S. —— (1973). Certainly there is no satisfactory proof that the government deliberately suppressed this evidence that would merit the application of a less stringent rule, *Id.* In

light of the evidence presented, it is reasonable to conclude, as did the trial court, that Stone, by offering the tapes, was attempting to "shake down" Goldman for their price.

Goldman argues that he was denied a fair trial because of prejudicial publicity during the trial. Certainly the trial did gain some notoriety. However, a reading of the record reveals the great care of the judge in insuring that the jurors were not exposed to such publicity. There was no evidence that any juror saw any publicity or commentary on the case which affected his or her judgment, unlike the cases of *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966) and *United States* v. *Rattenni*, —— F.2d —— (2d Cir. 1973) cited by appellant. Appellant's reference to *Estes* v. *Texas*, 381 U.S. 532 (1965) is equally inapposite.

Goldman's fourth contention is that there was insufficient evidence of, and an incorrect charge on, the issue of his knowledge and intent. As to the issue of proof there was direct testimony on this point by Terranova. If the jury chose to believe him, they certainly had the right to do so, The charge was equally proper. The court stated in part:

> To find a defendant guilty of conspiracy you must find that he knowingly and willfully joined the conspiracy with the specific intent and purpose of furthering its objective.

This read in light of the nature of the conspiracy was sufficient to apprise the jurors of the elements of the offense.

Goldman's fifth allegation of error centers around the court's refusal to charge the jury that they must find, beyond a reasonable doubt, that an overt act, alleged in the indictment, occurred in the Southern District of New York. However, venue need not be proven beyond a reasonable doubt, *United States* v. *Trenary*, 473 F.2d 680, 682 (9th Cir. 1973); *see also United States* v. *Brawer*, 450 F.2d 799, 804

n.11 (2d Cir. 1971), *cert. denied*, 405 U.S. (1972). And in the present record there is abundant evidence from which a jury could find proper venue in the Southern District. Thus, this contention of Goldman's is also without merit.

Finally, Goldman contends that the government violated the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963) in that it failed to reveal an alleged deal with Terranova. This point has been covered in the discussion of the final argument raised by Dellacroce and nothing more is necessary here than to reaffirm the propriety of the judge's action.

Catalano

Turning finally to the contentions of appellant Catalano who adopts all the arguments considered above and specifically reiterates and stresses the second argument raised by Goldman concerning alleged prosecutorial misconduct, for the reasons above stated we find that they do not constitute reversible error.

In conclusion, each argument raised by the respective appellants has been considered and found to be without merit. The judgment and the orders appealed from are affirmed.

OAKES, *Circuit Judge* (concurring):

I concur in the result.

APPENDIX B

Statutes Involved

Title 18 United States Code, § 371. Conspiracy.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 26 United States Code, § 7201. Attempt to evade or defeat tax.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Title 26 United States Code, § 7206(1). Fraud and false statements.

Any person who —

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contain or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

* * *